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Ambition, complexity and legitimacy of pursuing mutual supportiveness through the EU's external environmental action

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Abstract

This contribution aims to identify the strengths and weaknesses of the EU's external action in pursuing holistic environmental protection outside its borders. First the ambition of the EU's external environmental action will be illustrated, in its objective to support environmental multilateralism and contribute to shape a holistic approach in international environmental law, in light of the Treaty requirement of environmental integration (Article 11 TFEU) and the emerging international principle of mutual supportiveness. Then attention will be drawn to the complexity of the EU's external environmental action, by looking at the plethora of external relations tools used by the EU to achieve its global environmental objectives. The central part of the paper will assess the legitimacy of EU external environmental action against the international environmental principle of common but differentiated responsibility, taking recent EU initiatives on sustainable forest management and biofuels as case studies. The conclusions will point to promising approaches to ensure that EU external environmental action fully respects EU and international law.

Keywords

EU external relations; legitimacy; common but differentiated responsibility; climate change; biodiversity; biofuels; sustainable forest management

Ambition, complexity and legitimacy of pursuing mutual supportiveness through the EU's external environmental action

Dr Elisa Morgera¹

Introduction

The role of the EU as environmental norm generator and exporter is increasingly being supported by complex interactions between EU internal regulation with extraterritorial implications,² as well as unilateral and bilateral external action, in a combined attempt to influence on-going multilateral environmental negotiations. This is part of the EU's strategy to act as a global environmental leader against the background of fragmented international environmental law, and in particular the need for mutual supportiveness between the international climate change regime and the international biodiversity regime.

This contribution aims to identify the strengths and weaknesses of the EU's external action in pursuing holistic environmental protection outside its borders. In the first section the *ambition* of the EU's external environmental action will be illustrated, in its objective to support environmental multilateralism and contribute to shape a holistic approach in international environmental law, in light of the Treaty requirement of environmental integration (Article 11 TFEU) and the emerging international principle of mutual supportiveness. The second section examines the *complexity* of the EU's external environmental action, by looking at the plethora of external relations tools used by the EU to achieve its global environmental objectives. The third and central part of the paper will then assess the *legitimacy* of EU external environmental action against the international environmental principle of common but differentiated responsibility, taking recent EU initiatives on sustainable forest management and biofuels as case studies. The concluding section will point to the diversity of approaches currently deployed by the EU and their characteristics that are most promising to ensure that EU external environmental action fully respects EU and international law.

The ambition of the EU's external environmental action

The new Treaty-based framework on the EU's external action clearly emphasizes the EU's external *environmental* agenda and its various levels, by providing that all external activities of the Union should foster the sustainable environmental development of developing countries, with the primary aim of eradicating poverty; help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources;³ and promote an international system based on stronger multilateral *environmental* cooperation and good global *environmental* governance.⁴ This confirms the

¹ School of Law, University of Edinburgh. The author wishes to thank James Harrison, Gracia Marin Duran, Rok Zvelc and another anonymous reviewer from the European Commission for their valuable comments on previous drafts of this paper; and Riccardo Beltrame for his editorial assistance. The author also gratefully acknowledges the financial support provided by the Christie Law Fellowship 2009/2010.

² As opposed to measures with an extraterritorial 'effect': see distinction drawn by AG Kokott with regards to EU internal measure that do not embody a concrete rule of conduct for subjects beyond the territory of the EU, but still create an indirect incentive for them: Opinion, C-366/10 Air Transport Association of America and Others, 6 October 2011, paras. 145-147.

³ Art. 21(2)(d) and (f) TEU. See [contribution by Joris Larik to this collection](#).

⁴ Art. 21(2)(h) TEU, read in conjunction with the above-mentioned provisions and Article 11 TFEU on

pre-existing Treaty-based requirement of environmental integration, which provides that the more specific objectives, principles and criteria specific to the EU environmental policy⁵ should be applied in all other EU policies, be these external or internal, in the same way as they must be applied in the environmental policy.⁶ Conversely, the EU's external environmental action is expected to contribute to the other objectives of the Union's external relations, such as supporting human rights, preventing conflicts and encouraging the integration of all countries into the world economy.⁷ In addition, the EU is under a general obligation to 'promote multilateral solutions to common problems, in particular in the framework of the United Nations',⁸ which encompasses multilateral solutions to common environmental problems devised through relevant UN environmental initiatives and instruments.

While these broadly-framed objectives already represent a challenging external agenda for the EU, the requirement of environmental integration adds a further layer of ambition. Aside from the greening of non-environmental policies, Article 11 TFEU also entails that EU environmental law itself is to be construed and interpreted broadly, taking into consideration *all* of the EU environmental objectives, principles and criteria⁹ - in essence requiring a holistic approach to EU environmental law-making. This dimension of environmental integration is becoming increasingly relevant as climate change is steadily receiving political priority at the international and EU level,¹⁰ because of its prominent position in the global development agenda,¹¹ its securitization,¹² its increasingly sophisticated rules as well as high-profile climate finance.¹³ On the other hand, possible negative impacts of climate change response measures on other areas of environmental protection and cooperation are

environmental integration ("Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.")

⁵ Art. 191 TFEU.

⁶ N. Dhondt, *Integration of Environmental Protection into Other EC Policies* (Europa Law Publishing, 2003), at 84; and discussion in G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012) ch. 1.

⁷ For a discussion, see M. Cremona, 'Coherence and EU External Policy' in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012); and specifically on human rights obligations concerning the EU's external environmental action, see D. Augenstein, 'The human rights dimension of environmental protection in EU external relations post-Lisbon', in the same collection.

⁸ Art 21(1), second sentence TEU.

⁹ Dhondt, *supra* note 6, at 179, on basis of Joined Cases C-175/98 and C-177/98, Criminal proceedings against Paolo Lirussi and Francesca Bizzaro, [1999] ECR I-6881; Joined Cases C-418 and 419/97, ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer and Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland, [2000] ECR I-4475; and Case C-318/98 Criminal proceedings against Giancarlo Fornasar, Andrea Strizzolo, Giancarlo Toso, Lucio Mucchino, Enzo Peressutti and Sante Chiarcosso, [2000] ECR I-4785.

¹⁰ As reflected in the specific mention of climate change in Art. 191(1) TFEU, which reads: "Union policy on the environment shall contribute to pursuit of the following objectives: ...promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change" (emphasis added). For an earlier discussion about the political priority attached to climate change by the EU, see E. Morgera and G. Marín Durán, 'The UN 2005 World Summit, the Environment and the EU: Priorities, Promises and Prospects', (2006) 15 *RECIEL* 1-18.

¹¹ E. Morgera, 'The 2005 UN World Summit and the Environment: The Proverbial Half-Full Glass?' (2006) 15 *Italian Yearbook of International Law* 53-80.

¹² F. Sindico, 'Climate Change: A Security (Council) Issue?' (2007) 1 *Carbon and Climate Law Review* 26-31.

¹³ C Streck, 'Ensuring New Finance and Real Emission Reduction: A Critical Review of the Additionality Concept' (2011) 2 *Carbon and Climate Law Review* 158.

increasingly identified by the international community, particularly in the area of biodiversity.¹⁴

The need for a holistic interpretation of what can be perceived as fragmented¹⁵ international environmental law is expressed in the principles of *pacta sunt servanda* and sustainable development, and more clearly articulated in the emerging principle of mutual supportiveness.¹⁶ The latter requires, at the interpretative level, that States disqualify solutions to tensions between competing regimes involving the subordination of one regime to the other; and, at the law-making level, that states exert good-faith efforts to negotiate and conclude instruments that clarify the relationship between competing regimes, when interpretative reconciliation efforts have been exhausted.¹⁷ While this principle is usually invoked in the context of the trade and environment nexus,¹⁸ the increasing tensions between the international climate change regime and the international biodiversity regime equally call for a mutually supportive approach to the further development and implementation of the two legal frameworks.¹⁹ Mutual supportiveness may thus have similar implications to those of the EU Treaty-based requirement of environmental integration in the context of tensions between the international climate change regime and the international biodiversity regime. Namely, it calls upon the EU to address climate change as a threat to biodiversity (proactively addressing the negative impacts of climate change, and of climate responses, on biodiversity and community livelihoods); and as a response that contributes to biodiversity conservation and sustainable use (ensuring the adoption of mitigation and adaptation measures with biodiversity co-benefits).²⁰ Thus, both in light of the requirements of EU primary law and the Union's international obligations, EU external environmental action is to take a holistic approach, ensuring that other sectoral environmental initiatives (be they external or internal) consider climate change implications,²¹ and at the same time that broader environmental concerns are fully accounted for in devising and implementing climate change measures (that is, that climate change response measures are environmentally sustainable).²²

¹⁴ The parties to the Convention on Biological Diversity (Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79; hereinafter, CBD) have been increasingly addressing the environmental sustainability of response measures to climate change: E. Morgera, 'Far away, so close: A legal analysis of the increasing interactions between the Convention on Biological Diversity and climate change law' (2011) 2 *Climate Law* 85-115; and CBD Secretariat, 'Connecting Biodiversity and Climate Change Mitigation and Adaptation: Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change' (Technical Series, No. 41, Montreal 2009).

¹⁵ H van Asselt, F. Sindico and M. Mehling, 'Global Climate Change and Fragmentation of International Law' (2008) 30 *Law and Policy* 423; E. Morgera, 'The contribution of international biodiversity law to fighting climate change: no need to reinvent the wheel for a human rights-based approach' in E. Hollo, K. Kulovesi and M. Mehling (eds), *Climate Change and the Law: A Global Perspective* (Springer, forthcoming).

¹⁶ Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the WTO-and-Competing-Regimes Debate?' (2010) 21 *EJIL* 649, at 662.

¹⁷ *Ibid.*, at 661-669.

¹⁸ See contribution by Marin Duran to this collection.

¹⁹ This argument is fully developed in Morgera, 'Far away, so close...', *supra* note 14, at 87-90.

²⁰ These objectives have already been emphasized by the European Parliament (Resolution of 22 May 2007 on halting the loss of biodiversity by 2010 (2006/2233(INI)), paras. 6 and 67-68); and more recently by the Council, 'Conclusions on the EU Biodiversity Strategy 2020', 23 June 2011, paras. 3 and 16.

²¹ Climate change mainstreaming has become an explicit Treaty requirement, based on a combined reading of Article 11 TFEU and Article 191(1), where climate change is for the first time explicitly mentioned as a result of the amendment introduced by the Lisbon Treaty.

²² For such an assessment in the context of the EU climate policy, see K. Kulovesi, E. Morgera and M. Muñoz 'Environmental Integration and the Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' 48(3) *CMLR* 829-891.

To achieve these objectives, the Union has put in place three modalities to support the development and implementation of international environmental law. First, the EU seeks to use its external action to politically, technically and financially support the implementation of *existing* multilateral environmental agreements beyond its borders, particularly in developing countries. Second, the EU is also using its external action tools to build alliances with third countries, regions or groups of countries with a view to influencing *on-going* international environmental negotiations. Third, the EU is also using these tools to make progress on environmental issues on which the international community has been unable to launch negotiations towards an international legally binding agreement: in the *absence* of multilateral environmental negotiations, the EU wishes to pursue certain environmental goals with other willing countries with a view to building international consensus from the bottom up.²³ This strategy clearly aims at proactively addressing cases in which multilateralism appears slow or ineffective, while also having the potential to promptly respond to the changing multilateral landscape, so that EU external environmental action switches from one of the above-outlined modalities to the other depending on progress or lack thereof at the multilateral level. The EU therefore aims to use its unilateral and bilateral approach as a *complement*, rather than as alternative, to multilateralism.

The complexity of EU external environmental action

The strategy just illustrated is traditionally carried out by the EU and its Member States as a powerful negotiating block in multilateral environmental negotiations, and as one of the world's largest providers of funding for multilateral environmental protection initiatives and instruments. More recent are the EU's more systematic efforts to support its global environmental leadership through its external relations tools at the unilateral, bilateral and inter-regional level.

Trade-related instruments include sophisticated clauses on environmental cooperation in bilateral and inter-regional agreements, which increasingly rely on international environmental standards. While these agreements have different denominations and objectives, their environmental clauses are notably similar.²⁴ In particular, the bilateral agreements concluded by the EU with third countries or regions since 2005 ('post-Global Europe agreements')²⁵ establish obligations to effectively implement and enforce key multilateral environmental agreements (MEAs) in the context of trade and sustainable development chapters. In addition, environment-specific cooperative monitoring and dispute-resolution mechanisms are set up in that context, requiring the involvement of environmental experts and allowing also for advice to be sought from MEA Secretariats.²⁶ The negotiations of these agreements are preceded by Sustainability Impact Assessments (SIAs), which contribute to identify trade-offs between the trade component of the agreement under negotiation and environmental

²³ Marin Duran and Morgera, *Environmental Integration in the EU's External Relations*, supra note 6, ch. 7.

²⁴ Ibid, ch. 2.

²⁵ As their negotiations were launched by the Commission, 'Communication – Global Europe: Competing in the world: A contribution to the EU's Growth and Jobs Strategy', COM (2006) 567 final, 4 October 2006. See Marin Duran and Morgera, *Environmental Integration in the EU's External Relations*, supra note 6, at 133-142, and for an insider's perspective, R. Zvelc, 'Environmental integration in the EU trade policy: the examples of the GSP+, trade sustainability impact assessments and free trade agreements', in Morgera (ed.), *The External Environmental Policy of the European Union*, supra note 7.

²⁶ This is the case of association agreements (Art. 217 TFEU), partnership and cooperation agreements, as well as free trade agreements between the EU and individual third countries or groups of third countries. For a comprehensive assessment, see Marin Durán and Morgera, *Environmental Integration in the EU's External Relations*, supra note 6, ch. 2.

protection in the EU and in the partner country: SIAs thus often serve to address global environmental issues or instruments.²⁷ For countries that have no trade agreement in place with the EU, the Generalized System of Preferences (GSP) unilaterally offers developing and least-developed countries trade incentives that are made conditional upon the ratification and effective implementation of key MEAs.²⁸

In terms of development aid, the EU practice of integrating environmental concerns in external assistance is also increasingly targeting the implementation of key MEAs, as well as contributions to the reform of global environmental governance with the explicit objective of shaping it by the external dimensions of the EU's own environment and climate change policies.²⁹ In addition, the EU institutionalizes a plethora of policy dialogues with various individual developed and developing countries, and with various groups of third countries, for the periodic exchange of views on environmental priorities and respective negotiating positions. These exercises, which are mainly organized at the initiative of the EU, serve to develop specific action plans that also address global environmental issues.³⁰

These instruments are inter-linked in a complex and somewhat obscure manner: SIAs feed into the negotiations of bilateral agreements, but their outcomes should also be taken into account in the implementation of these agreements, particularly because some of the recommendations emerging from SIAs may be addressed through other EU external relations tools, such as financial and technical assistance. The implementation of bilateral agreements is followed up on through policy dialogues, which produce action plans to attract funding on certain priority activities falling under the broad scope of the environmental cooperation clauses included in bilateral agreements. The allocation of EU external funding, however, remains separate from dialogue processes and in the vast majority of cases, also from bilateral agreements: generally it is then up to the EU regulations on each funding instrument to set the principles and procedures for integrating environmental requirements in EU external funding.³¹ Enhanced dialogue is, in turn, seen as an objective of the Union's external funding, as well as a means to increase the visibility of EU financial and technical assistance supporting environmental protection in partner countries. Furthermore, dialogues are expected to be informed by SIAs and ex-post SIAs, and are used by the EU to support the understanding beyond its borders of certain pieces of EU internal environmental legislation with extraterritorial implications.

The complexity of such a toolbox is self-evident, and there appears to be no systematic monitoring and assessment of its combined effectiveness. The Commission has already noted that even international consultants carrying out SIAs are not aware of the full breadth of external relations tools used by the EU to address trade-offs between environmental protection and socio-economic development.³² It is therefore quite likely that such complexity puzzles outsiders, fuelling lack of trust

²⁷ Ibid., ch. 6.

²⁸ Ibid., ch. 3. This is the "GSP-plus" under Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, [2008] OJ L 211/1.

²⁹ Commission, 'Environment and natural resources thematic programme - 2011-2013 strategy paper and multiannual indicative programme', 29 October 2010, at 25.

³⁰ Marín Durán and Morgera, , *Environmental Integration in the EU's External Relations*, supra note 6, ch 5.

³¹ G. Marín Durán, 'Environmental Integration in EU Development Cooperation: Responding to International Commitments or Its Own Policy Priorities?' in Morgera (ed), supra note 7.

³² Commission, 'Position Paper: Trade SIA of the Negotiations of a PCA between the EU and China' February 2009, at 5; Commission, 'Position Paper: Trade Sustainability Impact Assessment of the Euro-Mediterranean

or at least limited understanding in third country governmental counterparts and stakeholders. It may also be unmanageable for the various EU institutional actors involved with obvious risks of duplicated efforts, wasted resources and overlapping or even conflicting results as a consequence. The credibility and coherence of the EU external environmental action may therefore be victims of its complexity.³³

The legitimacy of EU external environmental action?

In the face of the high level of ambition and growing complexity of EU external environmental action, an analysis of the legitimacy³⁴ of relevant initiatives seems warranted for at least two reasons. From an EU law standpoint, it seems necessary to ascertain whether and under what conditions the Union's significant resources devoted to unilateral, bilateral and inter-regional action are effectively used for the pursuit of multilateral environmental objectives as required by the Treaties. And from an international law standpoint, it seems necessary to consider whether these EU initiatives comply with general principles of international law, such as mutual supportiveness, as well as the objectives and principles of the multilateral environmental agreements to which the EU and its Member States are parties, and to which the EU unilateral and bilateral external relations initiatives are explicitly linked.

The concept of common but differentiated responsibility,³⁵ that is a key feature of international environmental law, provides an ideal lens to further explore these concerns. Leaving aside questions related to the status of this concept (as a general principle of international law or just a recurring feature of treaty law in the area of environmental protection),³⁶ common but differentiated responsibility will be used in this chapter as a useful conceptual benchmark to assess the legitimacy of the EU external environmental action, with the very pragmatic purpose of testing the outside credibility of EU initiatives as an essential precondition for their effectiveness.

The principle essentially justifies the design of different international obligations on the basis of differences in the current socio-economic situations of countries and their historical contribution to a specific environmental problem, thus "reconcil[ing] the tensions between the need for universalism in taking action to combat global environmental problems and the need to be sensitive to individual countries' relevant circumstances" and thereby responding to concerns of legitimacy, equity and

Free Trade Agreement' June 2009, at 6; Commission, 'Position Paper on the SIA of the EU-Cooperation Council of the Arab States of the Gulf (GCC) SIA' March 2006, at 6.

³³ The now defunct Cardiff process – a European Council-led exercise to closely monitor environmental integration in the work of sectoral Council formations – could be revived or inspire another periodic process to track and assess renewed environmental integration efforts at the internal/external action interface. On the Cardiff process, see Commission, 'Communication on partnership for integration: a strategy for integrating environment into EU policies' COM (1998) 333 final and Commission, 'Working Document on integrating environmental considerations into other policy areas – A stocktaking of the Cardiff process' COM (2004) 394 final.

³⁴ This contribution will refer both to input legitimacy, as a transparent, participatory and expertise-inclusive process, and output legitimacy, as the legality and effectiveness of the result of decision-making: for a discussion from an EU internal environmental regulation perspective, see M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford, Hart Publishing, 2005), at 117-148.

³⁵ Rio Declaration on Environment and Development, (1992) UN Doc A/CONF.151/26 vol 1, Annex 1, Principles 6-7. See generally, L. Rajamani, *Differential Treatment in International Environmental Law* (OUP, 2006). See also contribution by Scott and Rajamani in this collection.

³⁶ E Hey, 'Common but Differentiated Responsibilities' in R. Wulfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, 2010, online edition), considers it a general principle of international law; C. Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 AJIL 276, concludes that it is not "a customary principle of international law".

effectiveness.³⁷ Several of its corollaries may be employed to analyse EU external environmental action.³⁸

First, the principle supports the role of developed countries in taking the lead in addressing global environmental issues,³⁹ which is certainly one of the main motivations of EU pioneering environmental legislation with extraterritorial implications. Secondly, the principle entails the respect on the part of developed countries of the allocation of less burdensome obligations on developing countries.⁴⁰ therefore, in the context of the EU unilateral and bilateral external relations tools, this prevents the Union from subverting globally determined allocation of international responsibility, particularly through trade-related instruments. Third, in terms of development aid, the principle is usually translated in developed countries' obligations to transfer technology and "new and additional" financial means to developing countries, to enable them to implement international environmental obligations.⁴¹ In that respect, it serves as a 'test for the seriousness of efforts and willingness to cooperate' of developed countries.⁴² The amounts of assistance, as well as its priorities and modalities, therefore need to be closely scrutinized. It has been argued, for instance, that the EU should limit itself to procedural guarantees for environmental integration in its external assistance (through improved prior assessments, follow-up, monitoring and evaluation), leaving substantive and output-oriented environmental integration to recipient countries.⁴³

On this premise, two case studies have been selected to test whether the EU external environmental action can be considered legitimate under EU law and international law in the way it addresses issues at the intersection of climate change and biodiversity. The case studies will thus seek to determine whether the EU is living up to its ambition of being a global environmental leader through norm creation and export by pursuing a holistic approach to environmental protection in its external action. By doing so, it will also be investigated whether the Union fulfils its international obligations in light of mutual supportiveness and its Treaty obligations related to environmental integration, while fully respecting the principle of common but differentiated responsibility. The purpose of the following two examples is then to show the intricate network of domestic regulation with extraterritorial implications and external action, as well as the different strategies that the EU has put in place to complement and contribute to multilateralism.⁴⁴

³⁷ T Honkonen, 'The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations' (2009) 18 RECIEL 257, at 259.

³⁸ To that end, I find particularly useful the schematic identification of the implications of this principle proposed by Hey, *supra* note 36.

³⁹ United Nations Framework Convention on Climate Change, 4 June 1992, 1771 UNTS 107, entered into force for the EU on 21 March 1994 (UNFCCC), Art. 3.

⁴⁰ There are various examples in MEAs of differentiated responsibilities: the most notable is the Kyoto Protocol, which provides for quantified and time-bound obligations to mitigate climate change only for so-called "Annex-I countries", i.e. developed countries.

⁴¹ This is a common obligation across MEAs, although it is most clearly expressed in CBD art. 20(4).

⁴² Streck, *supra* note 13, at 159-160 and 168.

⁴³ A Persson, 'Environmental Policy Integration and Bilateral Development Assistance: Challenges and Opportunities with an evolving Governance Framework' (2009) 9 *International Environmental Agreements* 409.

⁴⁴ See generally contribution by De Witte & Thies in this collection.

4.1 Biofuels

The EU has prominently attempted to demonstrate its global environmental leadership by unilaterally setting the first supra-national standards for the sustainable production of biofuels, in the face of protracted and inconclusive multilateral negotiations.⁴⁵ Biofuels provide an ideal testing ground for mutual supportiveness in international environmental law. They are fuels of renewable and biological origin that may help supplant fossil fuels and therefore help the fight against climate change, but that have been associated with alleged negative impacts on the environment (particularly in terms of deforestation), indigenous and local communities, and small-hold farmers.⁴⁶

The EU's 2009 Renewable Energy Directive introduced sustainability criteria for biofuels, including imported ones, to protect high-value biodiversity land and high-value carbon-stock land as well as ensuring delivery of substantial reductions in greenhouse gas emissions. The criteria have thus been unilaterally set by the EU, but were expressly based on international reference documents.⁴⁷ Lack of compliance with these criteria does not lead to a ban on imports or use within the EU, but rather to a series of disincentives.⁴⁸ This is explicitly motivated by the concern that biofuels production in third countries might not respect minimum environmental or social requirements and by the desire to promote the production of biofuels and bioliquids *worldwide*,⁴⁹ in a move towards 'contingent unilateralism'.⁵⁰ Notably, the Directive indicates that the EU will endeavour to conclude bilateral or multilateral agreements with third countries containing provisions on the sustainability criteria.⁵¹

In terms of mutual supportiveness, the Directive adopts a three-tiered approach. First, it requires that biofuels and bioliquids must not be made from raw material obtained from land with high biodiversity value and protected areas, or highly biodiverse grassland.⁵² Second, for other biodiversity dimensions that are not explicitly covered by the sustainability criteria, the Directive provides complementary monitoring requirements: the Commission is expected to report on possible broader impacts in third countries that are a significant source of raw material for biofuels consumed within the Union as to their ratification and implementation

⁴⁵ The question of biofuels sustainability standards is currently being discussed in multiple international fora such as the Convention on Biological Diversity (e.g., CBD Decision X/37, Biofuels and biodiversity (2010)); and the Food and Agriculture Organization of the UN (FAO hosts the Global Bioenergy Partnership, which brings together public, private and civil society stakeholders and adopted in May 2011 the first global, government-level consensus set of voluntary, science-based indicators for assessing the sustainable production and use of bioenergy (see www.globalbioenergy.org). See also E Morgera, K Kulovesi and A Gobena (eds), *Case Studies on Bioenergy Policy and Law: Options for Sustainability*, FAO Legislative Study No. 102 (Rome, FAO, 2010), at 15-34.

⁴⁶ CBD Subsidiary Body on Scientific, Technical and Technological Advice, 'New and emerging issues relating to the conservation and sustainable use of biodiversity: biodiversity and liquid biofuel production' UN Doc UNEP/CBD/SBSTTA/12/9 (2007).

⁴⁷ Directive (EC) 2009/28 of the European Parliament and of the Council on the promotion of the use of energy from renewable sources [2009] OJ L140/16 (Renewables Directive), preambular paras. 69, 73 and 77.

⁴⁸ See detailed discussion in Kulovesi et al, *supra* note 22, at 883-884.

⁴⁹ Renewables Directive, see note 47, recital 74.

⁵⁰ J Scott, 'The Multi-level Governance of Climate Change' (2011) 4(1) *Carbon and Climate Law Review* 25, 28 and 32. See also, in reference to other EU external environmental action, the contribution by Scott and Rajamani to this volume.

⁵¹ Renewables Directive, see note 47, Art 18(4).

⁵² *Ibid.*, Art. 17(3).

of other relevant MEAs.⁵³ While noting the importance of broader land use issues,⁵⁴ land-related environmental or social concerns, however, were not included in the sustainability criteria, regardless of lengthy negotiations in the context of the Convention on Biological Diversity (CBD) with regards to biofuels impacts on indigenous and local communities' rights.⁵⁵ Instead, the Commission is tasked with biannual reports on the impact on the respect of land-use rights in third countries.⁵⁶ Thus, the matter is kept under review for the time being, with the possibility for the Commission to propose 'corrective action.'⁵⁷ Third, the Renewables Directive calls upon the Commission to maintain dialogue with third countries and biofuels producers, consumer organisations and civil society concerning the general implementation of the Directive.⁵⁸ This is particularly significant in light of the extensive monitoring tasks assigned to the Commission vis-à-vis third countries, thus possibly injecting a sense of partnership in an otherwise unilateral exercise.⁵⁹

Not only has the EU systematically referred to the Directive in its negotiating position under the CBD when biofuels were discussed at the multilateral level,⁶⁰ hoping to contribute to developing international standards 'at least consistent with EU standards,'⁶¹ but also used the Directive in combination with bilateral tools of external relations as a basis for building alliances with individual third countries with a view to arriving at common/closer negotiating position at the multilateral level or inspiring domestic action beyond its borders. Dialogues between the EU and third countries or regions⁶² have provided an avenue for the discussion of respective negotiating positions on biofuels and sometimes led to commitments to hold bilateral high-level meetings in the run-up to key negotiating sessions.⁶³ In addition, the Sustainability Impact Assessments have addressed the issue of certification for biofuels among policy recommendation to ensure sustainability,⁶⁴ occasionally making express reference to the EU criteria as guidance for third countries.⁶⁵ The Commission has thus pointed to the opportunity to discuss the applicability of the EU biofuels sustainability criteria to processes carried out in third countries as a means to prevent negative environmental and social impacts arising from the EU's bilateral trade negotiations,⁶⁶ thereby taking an

⁵³ Ibid., Art. 17(7).

⁵⁴ Ibid., recitals 85 and 89, also referring to relevant questions of land degradation and desertification.

⁵⁵ 'Summary of the Fourteenth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice to the CBD: 10-21 May 2010', (2010) 9(514) ENB 12, at 12-14.

⁵⁶ Renewables Directive, see note 47, Art. 17(7).

⁵⁷ Ibid., Art. 17(7) last subpara. The analysis of the EU biofuels sustainability criteria from a biodiversity perspective is based upon Kuloesi et al, supra note 20, at 879-880.

⁵⁸ Renewables Directive, art 23(2).

⁵⁹ Ibid, art 17(7).

⁶⁰ Eg, ENB summary, supra note 55, at 12.

⁶¹ Contribution by Cremona to this collection.

⁶² EUROLAT – Resolution of 15 May 2010, 'Tackling climate change challenges together: for an EU-LAC coordinated strategy in the framework of the UNFCCC negotiations' (2010) paras 37-38.

⁶³ 'Third European Union-Brazil Summit, Stockholm, 6 October 2009 – Joint Statement' (14137/09 (Presse 285) 2009) paras. 2-12.

⁶⁴ IARC, Institute for Development Policy and Management, 'Trade Sustainability Impact Assessment of the Association Agreement under Negotiation between the European Community and MERCOSUR' (Final Report, 2009) 99; ECORYS Research and Consulting, 'Trade Sustainability Impact Assessment of the Association Agreement to be negotiated between the EU and Central America' (Draft Final Report, 2009) 90-91.

⁶⁵ ECORYS Research and Consulting, 'Trade Sustainability Impact Assessment of the FTA between the EU and ASEAN' (Final Report, 2009) Volume I, Main Findings and Recommendations, 60-61.

⁶⁶ Commission, 'Position Paper on the trade sustainability impact assessment of the EU-ASEAN FTA', June 2010, at 9; Commission, 'Position Paper on the of the EU-Central America Association Agreement', June 2010 at 4 and 6; Commission, 'Position Paper on the SIA of the EU-MERCOSUR Association Agreement' July 2010, at 5.

additional opportunity (besides the incentives created by its own Renewables Directive) to present EU internal regulation as a source of inspiration in third countries.

On the face of it, therefore, the EU has attempted, in a phased manner, to take an environmentally holistic approach to biofuels with a view to ensuring gains for climate change mitigation, as well as avoid negative impacts on biodiversity, and thus satisfying its own environmental integration requirement as well as its international obligations under various MEAs. The actual environmental benefits and scientific soundness of the EU legal framework have, however, been subject to continued criticism.⁶⁷ In terms of common but differentiated responsibility, the EU is certainly taking the lead on a matter that is difficult to tackle at the multilateral level, but it remains to be clarified whether the different circumstances of developing countries are fully taken into account in exporting the EU approach, and whether appropriate assistance is provided to facilitate developing countries' compliance with the criteria. Further research is also needed to ascertain whether developing countries' circumstances are reflected upon in the context of dialogues and participatory monitoring.

Bilateral and inter-regional dialogue may thus be critical for taking stock of third countries' needs and concerns on multilateral negotiations and domestic regulatory preferences, particularly because at the multilateral level the EU proposal on sustainability criteria for biofuels has not yet received sufficient support.⁶⁸ The impact of these exercises could be tested in the Commission's reports and its proposal for review of the Directive in the coming years from an inward perspective, and in evolutions of country negotiating positions in relevant multilateral negotiations from an outward perspective. The ultimate effect of the EU's approach remains in fact difficult to be assessed: by way of illustration, although the EU and Brazil have agreed to review bilaterally the state of the multilateral discussions on biofuels,⁶⁹ at the multilateral level Brazil continues to adamantly oppose the development of biofuels sustainability standards.⁷⁰

4.2 Sustainable forest management

Sustainable forest management has been a long-standing international concern for the EU and as such it has been addressed at the multilateral level with support for the development of a legally binding agreement on forests.⁷¹ In the absence of such a development, sustainable forest management has also been addressed under the CBD, and increasingly under the

⁶⁷ Ecologist, 'UK scientists launch scathing criticism of EU biofuel targets', *The Ecologist*, 2 June 2011; see also letter by Greenpeace and other leading NGOs to the President of the European Commission, 'Addressing indirect impacts of biofuels', 22 September 2011, at www.euractiv.com/sites/all/euractiv/files/biofuels%20letter.pdf.

⁶⁸ At the 2010 meeting of the CBD Conference of the Parties, it was merely agreed to analyse "*information on tools for voluntary use*" on sustainable biofuel production: CBD Decision X/37 *Biofuels and biodiversity*, para. 11, (2010).

⁶⁹ Fourth EU-Brazil Summit, 'Joint Statement' Brasília 14 July 2010, pars. 5-8.

⁷⁰ See Brazil's minimalist negotiating position at the latest round of negotiations on biofuels in the CBD context: S. Jungcurt et al, 'Summary of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity: 18-29 October 2010', (2010) 9:544 ENB at 22 (under 'CBD future work').

⁷¹ The EU advocated the development of a global, legally binding instrument on forests at the fifth session of the United Nations Forum on Forests ('Summary of the fifth session of the United Nations Forum on Forests' (2005) 13(133) ENB, at 4). See G Reischel, 'The EU and the UN Forest Negotiations: a case of failed international environmental governance?' (Paper presented to Marie Curie European Summer School on Earth System Governance, Vrije Universiteit, Amsterdam, 24 May-6 June 2007).

international climate change regime.⁷² At the unilateral and bilateral level, the EU has consistently provided external funding for the protection of tropical forests.⁷³ In addition, the idea of a global approach to deforestation has been supported by the EU through a combination of domestic regulation with extraterritorial implications⁷⁴ and bilateral external tools that have been explicitly linked to the EU's multilateral agenda. The EU has first developed an action plan and then enacted a series of regulations to tackle this global problem in the immediate term, in the face of limited progress at the multilateral level.⁷⁵ The EU approach is explicitly based on global soft-law commitments,⁷⁶ and made clearly compatible with on-going, albeit partial, multilateral efforts.⁷⁷ The underlying policy clearly points to an EU explicit agenda of gradually furthering a global multilateral forest agreement, or at least the linking of regional forest agreements, through concerted unilateral and bilateral action to address deforestation by exporter and importer countries.⁷⁸

The EU has thus clearly articulated its strategy for gradually building international consensus on sustainable forest management from the bottom up: it proposes to work with willing third countries on the *legality* of trade of timber as a neutral concept rather than the politically charged *sustainable* forest management⁷⁹ – a term that has resisted international definition thus far.⁸⁰ To this end, the EU first enacted in 2005 the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation setting up a licensing scheme for imports of timber based on bilateral agreements, called Voluntary Partnership Agreements (VPAs) to be concluded between the EU and timber-exporting third countries. The verification of the legality of harvests of timber imported into the EU is to be checked against compliance with the national law of the third State ‘*as set out in the VPA*’ – the latter reference points to a joint evaluation by the third country and the EU of the alignment of third-country national forest law with relevant multilateral standards.⁸¹ The VPA negotiations notably touch upon all elements of sustainability: they thus emphasize the links between disparate pieces of national law that are needed to achieve sustainable forest management on the ground.

⁷² C. Streck and S. Scholz, ‘The role of forests in climate change’, (2006) 82 *International Affairs* 861; and 3 *Carbon and Climate Law Review* (2008) (Special issue on forests).

⁷³ Regulation (EC) 2494/2000 on Measures to Promote the Conservation and Sustainable Management of Tropical Forests and Other Forests in Developing Countries [2000] OJ L288/6; Regulation (EC) 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation [2006] OJ L348/41, Arts 6(e) and 7(e).

⁷⁴ First on the Common Commercial Policy legal basis (Regulation 2173/2005, [2005] OJ L347/1) and then on the environmental legal basis (Regulation 995/2010, [2010] OJ L295/23).

⁷⁵ Commission, ‘Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an Action Plan’ COM (2003) 251 final, 3; endorsed by the Council, ‘Conclusions - Forest Law Enforcement, Governance and Trade (FLEGT)’ [2003] OJ C268/1.

⁷⁶ Ibid., at 5; WSSD Plan of Implementation, (2002) UN Doc A/CONF.199/20, Resolution 2, para 45(c).

⁷⁷ Namely, timber species listed under Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243; FLEGT Action Plan, supra note 75, at 20.

⁷⁸ Ibid., at 9 and 11.

⁷⁹ Although references to sustainable forest management remain in the bilateral agreement concluded by the EU under FLEGT: e.g., Voluntary Partnership Agreement between the EC and Ghana, [2010] OJ L70/3 (Ghana VPA): its objective is “consistent with the Parties’ common commitment to the sustainable management of all types of forests” (art. 1).

⁸⁰ The most recent attempt to do so, the Non-Legally Binding Instrument on All Types of Forests (UNGA Resolution 62/98 of 2008) only indicates that “sustainable forest management, as a dynamic and evolving concept, aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations” (para 3) and provides seven “thematic elements” for global monitoring, para 6(b) and related footnote. See also Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, (1992) UN Doc A/CONF.151/26 Vol. III (Rio Forest Principles) preambular para c.

⁸¹ Recitals 3-4, Ghana VPA, point to the multilateral instruments of reference.

The main incentive for third countries to participate in the FLEGT VPA process is receiving priority assistance for the upgrading of their legal and administrative framework related to forest management: the VPA thus provides, on the one hand, for the need for a ‘joint arrangement on financing and technical contributions from the EU and its Member States’⁸² and market incentives, such as encouragement of public and private procurement policies and market promotion.⁸³ Significantly, support is also provided by an independent, specialized international organization, namely the Food and Agriculture Organization of the UN (FAO) who is managing a global project funded by the EU to support African, Caribbean and Pacific countries in the review of their legislation and upgrading of their forest governance and law enforcement capacities.⁸⁴ FAO has a long-standing and well-respected tradition of providing expert and independent advice on the reform of national forest laws.⁸⁵ In the continued ‘absence or slow pace of multilateral progress’ on an international forest treaty,⁸⁶ however, the EU decided to create an additional incentive for third countries to engage in VPA negotiations, by creating an obligation of due diligence on operators placing timber and timber products on the EU market to ensure the legal origin of their timber products,⁸⁷ and establishing a presumption of compliance for timber originating from a VPA country and licensed accordingly.⁸⁸

The specialised track of bilateral negotiations leading to the conclusion of VPAs is noteworthy for its cooperative approach. VPAs are expected to include a series of common elements, namely the commitment to developing credible legal structures that are supportive of sustainable forest management practices and procedures to licence the export of legally harvested wood – that is, in accordance with third country national laws as revised to ensure alignment with relevant multilateral standards.⁸⁹ Linking legality to the forest-related legislation of the exporting country arguably aims to ensure the third country’s ownership of the initiative as well as demonstrate respect for its national sovereignty over its forest resources.⁹⁰ It is then coupled with a commitment from the third country to review its national legal framework when it does not support international standards on *sustainable* forest management,⁹¹ thus opening the door for a bilateral dialogue on the definition of this concept using national legislation of the third country as a departure point. An annex to the VPA includes the definition of legal harvest as agreed with local stakeholders which details standards of compliance with national forest legislation, social responsibility agreement, relevant cultural norms, and occupational and health safety legislation, and also outlines areas

⁸² E.g., Art. 15(4) Ghana VPA.

⁸³ E.g., Art. 18 Ghana VPA.

⁸⁴ See www.fao.org/forestry/acp-flegt/en. Note that while there is no formal link between the FAO FLEGT Programme and the VPAs, FAO assistance specifically targets countries depending on “their level of interest in the FLEGT Action Plan and in negotiating a VPA” through support for national and regional FLEGT/VPA workshops to share information, knowledge and lessons learnt, feasibility studies on VPA-related issues; and support for national multi-stakeholder committees in charge of VPA negotiations and for the participation of local stakeholders: FAO, Improving Forest Governance in Africa, the Caribbean and the Pacific (FAO, undated) 6 and 9, at http://foris.fao.org/static/data/acpflegt/4087Forestgovernance_en.pdf.

⁸⁵ See FAO Legal Office, ‘Legal Advisory Services: Forestry and Wildlife’, at <http://www.fao.org/legal/advserv/forest-e.htm>.

⁸⁶ Commission, ‘Proposal laying down the obligations of operators who place timber and timber products on the market’ COM (2008) 644/3, at 3.

⁸⁷ Regulation (EU) 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23, Art 4.

⁸⁸ Ibid, Art 3.

⁸⁹ FLEGT Action Plan, *supra* note 75, at 12-13.

⁹⁰ See Rio Forest Principles, *supra* note 80, para 1a.

⁹¹ FLEGT Action Plan, *supra* note 75, at 5.

in which national legislation should be improved.⁹² Another notable feature of the FLEGT approach is therefore the systematic involvement of third-country stakeholders in the definition of legality of timber with a view to setting out a broad-based understanding about the areas in which national legislation should be improved.

The FLEGT approach has already made visible inroads in the general bilateral tools of the EU's external relations, although the negotiations of VPAs remain a separate bilateral process. The initiative is explicitly mentioned⁹³ or hinted at⁹⁴ in clauses on trade in forest products in post-Global Europe bilateral agreements. The EU's external funding for environment explicitly emphasises the implementation of the FLEGT Action Plan at the national, regional and international policy development level; as well as the need to promote on the ground community-based forest management, respect for local and indigenous peoples' rights over forest land, private sector investment in sustainable forest management, and design of financial instruments for forest conservation.⁹⁵

The FLEGT initiative is also notable for demonstrating EU responsiveness to changed international landscapes. Deforestation issues are increasingly addressed in the context of the negotiations on a post-2012 climate change regime under the so-called REDD-plus item.⁹⁶ An incipient strategy by the EU is in fact emerging, to use FLEGT to influence forest-related negotiations as part of its broader agenda on the post-2012 international climate change regime.⁹⁷ The EU is thus considering capitalizing upon agreement on key concepts related to forest governance emerging from FLEGT, as well as the lessons learnt in the multi-stakeholder processes leading to the conclusion of VPAs. Both can provide inputs into multilateral negotiations on REDD-plus,⁹⁸ which have proven particularly complex in ensuring mutual supportiveness between climate change mitigation objectives, on the one hand, and biodiversity conservation and respect for the rights of forest-dwelling communities on the other hand.⁹⁹ The EU's FLEGT approach may thus contribute to mutual supportiveness within the international climate change regime.

⁹² E.g., Ghana VPA, Annex II.

⁹³ Agreement establishing an Association between the EU and its Member States, on the one hand, and Central America on the other (initialed 22 March 2011), Art 289.

⁹⁴ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other [2008] OJ L/289/I/3, Art 189; Free Trade Agreement between the EU and its Member States, on one side, and Colombia and Peru, on the other (initialled 24 March 2011), Art 273; Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (signed 10 May 2010), Art 25 and Free Trade Agreement between the European Union and its Member States of the one part, and the Republic of Korea, of the other part (signed 6 October 2010), Art 13.11.

⁹⁵ Commission, 2011-2013 strategy paper, *supra* note 29, at 22.

⁹⁶ REDD-plus means "reducing emissions from deforestation and forest degradation, conservation of forest-carbon stocks, sustainable management of forests, and enhancement of forest-carbon stocks." For a discussion, see H van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regime' (forthcoming) *NYU Journal of International Law and Politics*; A Savaresi, 'Reducing Emissions from Deforestation in Developing Countries under the UNFCCC. Caveats and Opportunities for Biodiversity' (2011) 21 *Yearbook of International Environmental Law* (online version).

⁹⁷ Commission, 'Proposal laying down the obligations of operators who place timber and timber products on the market', *supra* note 86, at 5; and Central America Association Agreement, *supra* note 81, Art 20; COPE FTA, *supra* note 82, Art 286; Second Revision of the Cotonou Partnership Agreement – Agreed Consolidated Text (11 March 2010), Art 32bis.

⁹⁸ For a more detailed discussion, see A. Savaresi, 'FLEGT and REDD: Interactions between EU Bilateral Cooperation and the Development of International Law' in Morgera (ed), *The External Environmental Policy of the European Union*, *supra* note 7.

⁹⁹ This relates to the international debate on the so-called "safeguards" for REDD-plus concerning biodiversity

Overall, the EU has shown willingness to take the lead in tackling sustainable forest management in a holistic way, accounting both for its biodiversity and climate change dimensions. In terms of common but differentiated responsibility, the FLEGT initiative can be usefully contrasted with the EU biofuels sustainability criteria: FLEGT is markedly more partnership-oriented, with its reliance on third country legislation and multilateral standards, consultation with third-country stakeholders and involvement of expert and impartial international organizations. Thus, in the FLEGT context, the EU explicitly combines trade incentives and external assistance. It acts as a co-creator of norms rather than an exporter, by using third country legislation as the starting point and relying on the expertise of an independent, specialized UN organization. The EU also has provided a clear explanation of its intentions in relation to the ultimate objective vis-à-vis the evolution of international environmental law.

Conclusions

Against its ambitious agenda for supporting environmental multilateralism and contributing to environmental sustainability beyond its borders, the EU has certainly taken action as a norm generator and exporter in devising holistic solutions to pressing global environmental challenges. This responds to its Treaty requirement of environmental integration and the international principle of mutual supportiveness. The Union has done so in a creative and complex manner, relying on a combination of domestic regulation with extraterritorial implications, various unilateral and bilateral external relations tools, and corresponding negotiating positions in multilateral environmental fora.

Due to the complexity of this strategy, however, the effectiveness, coherence and credibility of the EU external action cannot be taken for granted. In particular, developing countries may mistrust or at least misunderstand the EU's tools and intentions.¹⁰⁰ In particular they may fear that higher environmental standards than they have the human, technical and financial capacity to implement are imposed upon them unilaterally or bilaterally.¹⁰¹ With a view to proving the legitimacy of the EU external environmental action, therefore, several lessons can be drawn from comparing the experience of the EU biofuels sustainability criteria and FLEGT in light of the common but differentiated responsibility principle. Complexity should be systematically tackled by explicitly justifying the use of Union unilateral and bilateral tools against the goal of supporting environmental multilateralism, as in the case of the FLEGT Action Plan. In addition, input legitimacy is better ensured through specific provisions for dialogue and joint monitoring with third countries, which were only alluded to in the context of biofuels. Conversely, joint activities were fully fleshed out under the FLEGT VPA process, and coupled with structured stakeholder involvement and the participation of expert and independent

and forest-dependent communities. See Environmental Council Conclusions of 20 Dec 2010 on the Nagoya Conference of the Parties to the CBD, where Member States and the Commission are invited to "actively contribute to the preparation of advice on the application of relevant safeguards for biodiversity in relation to REDD+, in line with the CBD COP 10 decision, and facilitate the development and implementation of such safeguards under REDD+." This is already the case for the EU-Africa partnership: Third EU-Africa Summit, 'Joint Africa-EU Strategy Action Plan (2011-2013)' Tripoli 30 November 2010.

¹⁰⁰ For instance, on the unclear relationship between general bilateral agreements concluded by the EU with third countries and specialized bilateral relations under VPAs: R Hall, 'Undercutting Africa: Why EPAs Threaten the World's Forests and Forest Peoples' (2009) 8(1) *Trade Negotiations Insights* at www.ictsd.org/i/news/tni/39374/; and response by P Thompson (DG Trade), 'EPAs and Natural Resources: The European Sustainability Agenda' (2009) 8(4) *Trade Negotiations Insights* at www.ictsd.org/i/news/tni/45717.

¹⁰¹ B Chaytor, 'Environmental Issues in Economic Partnership Agreements: Implications for Developing Countries' ICTSD Issue Paper 1 (September 2009).

international entities. Output legitimacy could in turn be achieved by the EU and its partner countries acting as co-generators of norms, jointly identifying solutions to multilateral impasses, based on their respective internal frameworks and relevant international instruments, as in the VPA process.

Furthermore, accountability mechanisms should be put in place by the Union to clearly demonstrate the extent to which partner countries benefit from trade incentives and external assistance offered by the EU,¹⁰² and whether these effectively avoid any negative impacts on the environment.¹⁰³ The principle of common but differentiated responsibility in that respect entails that EU external assistance is provided in accordance with the increasing number of multilateral standards on financial assistance and technology transfer.¹⁰⁴ As the CBD governing body is developing more specific guidance particularly on synergetic climate and biodiversity financing,¹⁰⁵ it becomes critical to demonstrate mutual supportiveness in the EU unilateral and bilateral external relations instruments by respecting relevant international guidelines¹⁰⁶ or going above them, without however disregarding multilateral determinations as to the equitable relations between States with different financial and technical capacities.

Ultimately, the legitimacy of the EU external environmental action, in its complexity and ambition, depends on the good-faith efforts of the EU on the multilateral scene,¹⁰⁷ its openness in having recourse to unilateral and bilateral tools when multilateral progress is out of reach,¹⁰⁸ and its responsiveness to intervening developments in global fora. The linkage recently established by the EU between its FLEGT initiative and multilateral progress on deforestation in the international climate change regime is certainly an indication of such responsiveness. EU domestic regulation with extraterritorial implications can also provide specific guarantees to this end, such as review clauses expressly triggered by developments at

¹⁰² It remains true, for instance, that limited progress has been made in biodiversity mainstreaming in the EU development cooperation (Commission, 'Impact Assessment for the Communication Halting the Loss of Biodiversity by 2010 and Beyond' SEC (2006) 607, at 37 and 76-77; and Commission, 'Impact Assessment for the Communication Our Life Insurance, Our Natural Capital: an EU Biodiversity Strategy to 2020', SEC(2011) 540, at 16.

¹⁰³ The Court of Auditors, for instance, has unveiled the lack of a consistent system for the environmental screening of new projects, finding evidence that EIAs had not always been carried out where needed in EU external assistance (Special Report 6/2006 concerning the environmental aspects of the Commission's development cooperation [2006] OJ C 235/1).

¹⁰⁴ Hey, *supra* note 36.

¹⁰⁵ Note for instance that the Commission had indicated the need to apply the CBD Akwe: Kon Guidelines for environmental and socio-cultural impact assessments prior to projects affecting the lands of indigenous and local communities in third countries (Commission, 'Impact Assessment for the Communication Halting the Loss of Biodiversity by 2010 and Beyond', *supra* note 102, at 81). Several other guidelines have been produced by the CBD governing body on mutually supportive climate and biodiversity finance (see Morgera, 'Far Away, So Close', *supra* note 14, at 110-113).

¹⁰⁶ Particularly as the "EU environment-specific funding is made available to developing countries (as defined by the EU) whose environmental activities meet the priorities unilaterally established by the EU" on the basis of an assessment of the international context and geographic funding, with the exception of the European Development Fund, is also largely dominated by the EU": Marin Duran, 'Environmental Integration in the EU Development Cooperation...', *supra* note 31. The Commission has pointed to a commitment to support developing countries in evaluating their biodiversity funding needs "according to CBD guidelines" (Commission, 'Impact Assessment for the Communication Halting the Loss of Biodiversity by 2010 and Beyond', *supra* note 102, at 53-54).

¹⁰⁷ K Kulovesi, "'Make Your Own Special Song, Even if Nobody Else Sings Along': International Aviation Emissions and the EU Emissions Trading Scheme" (2011) 2 *Climate Law* 535.

¹⁰⁸ AG Kokott, *supra* n. 2, paras. 185-186, noted that the EU "could not reasonably be required to give...[multilateral] bodies unlimited time in which to develop a multilateral solution": I am grateful to Marise Cremona for having drawn my attention to this point.

the multilateral level and inputs from third countries at the bilateral level. In addition, dialogue with third countries can be used to build trust in on-going multilateral environmental negotiations, as well as to nurture regulatory experience-sharing, thus becoming a tool that specifically tackles risks of ‘unhealthy competition between various jurisdictions for legal influence or retaliation.’¹⁰⁹

What emerges from the comparison of the biofuels and FLEGT initiatives, furthermore, is that the EU is experimenting with a *variety* of models of engagement with third countries based on a variety of interactions between different tools and different levels of environmental regulation. While fully understanding the complex reasons of this differentiation and assessing the comparative effectiveness of different initiatives goes beyond the realm of a legal enquiry, it certainly shows the merit and necessity of analysing the contribution of the EU to global governance not only through the lenses of EU law, but also of international and transnational law.

¹⁰⁹ Kulovesi, *supra* n. 107.